Nos. 14-3284, 14-3814

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THREE D, LLC, d/b/a TRIPLE PLAY SPORTS BAR AND GRILLE

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR AMICUS CURIAE
SERVICE EMPLOYEES INTERNATIONAL UNION

Nicole G. Berner, Deputy General Counsel
Alvin Velazquez, Associate General Counsel
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 730-7490
Attorneys for Amicus Curiae Service Employees International Union

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *amicus curiae* make the following disclosure: SEIU has no parent company. No publicly-held corporation has a 10% or greater ownership in SEIU. The general nature and purpose of SEIU is to advocate for, protect, and advance workers' rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

INTEREST OF *AMICUS CURIAE*

The Service Employees International Union ("SEIU")[1] is a labor organization consisting of 1.9 million members throughout the United States, Canada, and Puerto Rico made up of healthcare workers, janitors, security officers, and public servants. At the heart of the case before this Court is whether the National Labor Relations Act ("NLRA" or "Act") protects workers who use social media platforms–in this case, by commenting and clicking "like" in response to a status update on Facebook–to engage in collective action in an attempt to improve their working conditions.

SEIU has a robust presence online and much experience with the use of social media platforms, including Facebook, to organize workers and spur change that improves working conditions in a variety of industries. SEIU's Facebook page, and its online presence generally, touch on many workplace issues ranging from wages and income inequality to benefits and workplace safety.[2] SEIU has invested significant resources into its online presence, and SEIU's Facebook page currently

---

[1] Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored or contributed money to fund this brief in whole or in part, and no person other than *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting the brief. The National Labor Relations Board has consented to the filing of this brief; Petitioner does not consent to the filing of this brief.

[2] SEIU International's Facebook page can be found at https://www.facebook.com/SEIU?fref=ts. Many of SEIU's locals also host and operate their own pages. All information for this brief comes from SEIU International's operation of its own Facebook page.

has 56,168 "likes." A recent post about wages in in the fast-food industry was shared more than 20,000 times and liked by more than 3,885 Facebook users. That post also drew many Facebook-user comments both in favor of raising wages for fast-food workers and sharply critical of SEIU's position.

Although SEIU is not seeking to organize Petitioner Triple Play's workers, SEIU has a significant interest in this case because Triple Play's incorrect legal arguments, if accepted, will chill workers from engaging in protected NLRA activity and severely hamper workers' exercise of their fundamental right to organize and act collectively to improve their wages and working conditions. For example, if Petitioner is confirmed in its legally incorrect view that Mr. Spinella's conduct in "liking" a co-worker's Facebook status was unprotected because the "like" could have been seen by customers, or in its equally incorrect view that Mr. Spinella's "like" met the test for defamation under *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), workers will be chilled from "liking" colleagues' posts asserting that their employer pays too little or maintains unsafe working conditions–an important modern form of co-worker communication that is core NLRA-protected activity and essential to employees' efforts to organize into labor organizations like SEIU. Moreover, Petitioner's position, if accepted, will lead to the absurd result that activity protected in the "off-line" world, like employee participation in a strike line, will be unprotected if posted about online, and

workers will be put in the impossible position of having to determine in advance whether posted information about their working conditions might possibly reach a customer.

In addition to having an interest in this case for the above reasons, SEIU has a unique perspective to offer as a large labor union made up of low-wage workers from geographically dispersed locations with a robust online presence. SEIU has significant experience and expertise with respect to workers' use of social media platforms, including the "like" and comment functions on Facebook, and SEIU's and its members' experiences show how Triple Play's position, if accepted, would undermine the Act. The SEIU Facebook page is a forum where workers, both union and non-union, exercise their rights under the NLRA to engage in discussion about the workplace. The union makes contact with millions of people through its page. SEIU submits that it can provide a perspective on the issues presented by this case that may be useful to the Court, since this case raises important questions about the nature of NLRA §7 rights for all workers who use social media, including but not limited to Facebook and Twitter.

SUMMARY OF THE ARGUMENT

Facebook is an incredibly important tool for worker collective action in the modern era, as SEIU and its members know and have experienced, and "liking" a Facebook post is an affirmative act well-recognized as a show of support.

Therefore, "liking" a co-worker's Facebook post is one method employees use to communicate to colleagues how they feel about workplace conditions, and to organize and engage in collective action to achieve change.

In this brief, SEIU first discusses and demonstrates the importance of Facebook as a modern, worker collective-action tool, relying on its and its members' extensive experience and with a particular focus on Facebook's "like" feature.[3] SEIU then elaborates on the National Labor Relations Board's ("NLRB's" or "Board's") arguments that this case was correctly decided under the *NLRB v. Local Union No. 1229, IBEW ("Jefferson Standard")*, 346 U.S. 464 (1953), and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), and rebuts Petitioner's arguments regarding *NLRB v. Starbucks Corp*., 679 F.3d 70 (2d Cir. 2012), which mis-interpret and mis-apply that case.

[3] SEIU agrees with all the NLRB's arguments regarding Ms. Sanzone and Triple Play's online policy but focuses on Mr. Spinella and his Facebook "like" because the "like" function, being particular to social media, presents a somewhat more novel fact-pattern.

ARGUMENT

I. In the social media era, Facebook "likes" are an important tool for worker collective action.

A. Much communication among co-workers takes place on Facebook.

Facebook has widespread appeal. Approximately 71% of adult Internet users and 58% of the total U.S. adult population are on Facebook.[4] Facebook has an average of 890 million daily users worldwide, 84% of whom are mobile users, meaning they access Facebook through their smartphones.[5] An estimated 70% of Facebook users visit Facebook on a daily basis.[6] And Facebook is an interactive platform–rather than passively viewing content on Facebook, a reported 65% of Facebook users frequently or sometimes post, comment, or share something on Facebook.[7]

Not surprisingly given its overall popularity, Facebook now plays an important role in workplace-related organizing and co-worker communication. Approximately 58% of Facebook users communicate with co-workers through

---

[4] *Social Networking Fact Sheet*, Pew Research Center, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Mar. 27, 2015).

[5] *Facebook Statistics Directory*, Socialbakers, http://www.socialbakers.com/statistics/facebook/ (last visited Apr. 9, 2015).

[6] Maeve Duggan, et al., *Demographics of Key Social Networking Platforms*, Pew Research Center (Jan. 9, 2015), http://www.pewinternet.org/2015/01/09/demographics-of-key-social-networking-platforms-2/.

[7] *Id.*

Facebook.[8] Indeed, Facebook is a "virtual water cooler," a space where co-workers can meet and interact to discuss issues related to work and daily life.[9]

The NLRB has recognized the significance of Facebook as a vehicle for organizing and engaging in concerted activity.[10] Facebook, too, has recognized its role in the workplace. Earlier this year, Facebook launched pilot testing for a program called "Facebook at Work"–a service that would provide individual companies and organizations with an internal "social network."[11]

B. Clicking "like" on Facebook is an important way for workers to communicate with their friends and each other.

1. Facebook basics

To use Facebook, an individual must first register. After registering with Facebook, a user can create an online Profile Page and add other Facebook users as "Friends."[12] A user's Profile Page typically features the user's name, a profile

---

8 *Id.*

9 *See e.g.*, Lauren K. Neal, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 Wash. & Lee L. Rev. 1715, 1716 (2012).

10 *See e.g.*, *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852 (Dec. 14, 2012); *Karl Knauz Motors, Inc.*, 2012 NLRB LEXIS 679 (Sept. 28, 2012).

11 Vindu Goel, *Facebook Looks to the Workplace for Future Growth*, N.Y. Times (Jan. 14, 2015, 8:49 PM), http://bits.blogs.nytimes.com/2015/01/14/facebook-looks-to-the-workplace-for-future-growth/?_r=0.

12 *Profile*, Facebook Help Center, https://www.facebook.com/help/131685390278177?sr=3&query=personal%20profile&sid=0MccUPGqigywBgKY (last visited Apr. 9, 2015); *What's the Difference Between Following Someone and Adding a Friend*, Facebook Help Center, https://www.facebook.com/help/255620881144653?

picture, photographs, biographical information, a list of the user's Facebook Friends, and a "Timeline."[13]

A Timeline is a space on a user's Profile Page where the user can post content including status updates, photographs, and stories.[14] Status updates can range from anything relating to current events or politics to working conditions. Facebook Friends can view and post content on each other's Timelines.[15] Facebook is the world's most popular online social networking site through which individuals communicate with friends and share information about their personal and working lives.[16]

Once a user has set up a Facebook page he or she is directed to a Home Page featuring a "News Feed."[17] A News Feed is a list of selected stories and posts from

---

sr=4&query=what%20is%20a%20friend&sid=0xIulm yb5bUs2yeLx (last visited Apr. 9, 2015).

[13] *Id.*

[14] *What is a Timeline*, Facebook Help Center, https://www.facebook.com/help/1462219934017791?sr=1&query=what%20is%20a%20timeline&sid=0LNHNO0UjEV6g36FT (last visited Apr. 9, 2015).

[15] *Id.* A user may alter which Friends have access to his or her Timeline by adjusting Facebook's privacy settings.

[16] *Id.*

[17] Lars Backstrom, *A Window Into News Feed*, Facebook, (Aug. 6, 2013), https://www.facebook.com/business/news/News-Feed-FYI-A-Window-Into-News-Feed.

Facebook friends and pages that the user subscribes to.[18] The News Feed is constantly updated as new things are posted.

A Facebook page for an entity, like SEIU, is essentially a Profile Page for the organization instead of for an individual.[19] Once a user "likes" an entity's Facebook page, they will receive regular alerts and updates regarding activity and posts on that page.[20]

2. How "likes" work

Facebook users can "like" others' posts or status updates and can also "like" an entity's Facebook page, such as SEIU's page. "Likes" are important in the Facebook universe for a number of reasons.

For one thing, Facebook uses an algorithm based in part on what a user has "liked" to determine which posts are featured on a user's News Feed.[21] News feeds are comprised of updates from a user's Facebook friends, or from pages a user "liked".[22]

Moreover, after clicking the "like" button, a user becomes connected to the liked content in that (1) anyone viewing the liked content can see that the user "liked" it, (2) a story will be posted to the user's Timeline that she "liked" the

---

18 *Id.*

19 *What is a Facebook Page*, Facebook Help Center, https://www.facebook.com/help/174987089221178 (last visited Apr. 9, 2015).

20 *Id.*

21 *Id.*

22 *Id.*

content, and (3) the poster of the liked content will receive a notification that the user "liked" it.[23] The liked content will also show up on the News Feeds of friends of the person who liked the content.[24]

Facebook "likes" are significant for other reasons as well. Facebook offers a tool called Graph Search, which allows users to search their Friends based on what pages they have liked.[25] And Facebook users may also see what their Friends have "liked" through "Sponsored Stories" on their News Feed.[26] After a user "likes" a Facebook Page, that user's Friends may see a Sponsored Story on their News Feeds where the user's name, profile picture, and the phrase "User likes this" is featured next to the Page's brand or logo.[27] Thus, by "liking" something, a user is not only linking herself to an organization but actively promoting and recommending it to her Facebook Friends. In turn, users may be more likely to look at a Facebook post or page that a Facebook Friend has "liked."

---

23 *What Does it Mean to "Like" Something?*, Facebook Help Center, https://www.facebook.com/help/ 452446998120360/ (last visited Apr. 1, 2015).

24 *Id.*

25 *How Facebook Thinks Its New Graph Search Will Help Advertisers*, Business Insider, http://www.businessinsider.com/facebook-graph-search-for-advertisers-2013-1 (last visited Apr. 1, 2015).

26 *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 791-92 (N.D. Cal. 2011)

27 *Id.*

3. Clicking "like" is an action taken by Facebook members to let other members know that they support or enjoy particular content.

Facebook "likes" are now a very common and important indicator of worker, consumer, and public engagement and support. In 2011, 44% of Facebook users between 18 and 22 years old "liked" content posted on a Friend's profile on a daily basis.[28] It is estimated that more than three billion "likes" and comments are posted on Facebook daily.[29]

"Likes" are significant as a way of expressing engagement with and loyalty to a product or cause. [30] According to a study on the impact of social media on brand engagement, for example, the customer's main motivation behind "liking" a page is customer loyalty.[31] Moreover, users "who click the Facebook 'like' button are more engaged, active, and connected with the content they 'liked' than the average Facebook user with the material they are engaging with."[32]

---

[28] Keith Hampton et al., *Social Networking Sites and Our Lives*, Pew Research Center, (June 16, 2011), http://www.pewinternet.org/2011/06/16/social-networking-sites-and-our-lives/.

[29] *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013).

[30] *What Does it Mean to "Like" Something?*, Facebook Help Center, https://www.facebook.com/help/ 452446998120360/ (last visited Apr. 1, 2015).

[31] *Do Facebook 'Likes' Mean Loyal Customers?*, Our Social Times, (May 4, 2012), http://oursocialtimes.com/do-facebook-likes-mean-loyal-customers-infographic/.

[32] *What Does it Mean to "Like" Something?*, Facebook Help Center, https://www.facebook.com/help/ 452446998120360/ (last visited Apr. 1, 2015).

"Likes" are also important because they serve as endorsements and personal referrals.[33] As Facebook's CEO Mark Zuckerberg has acknowledged "[n]othing influences people more than a recommendation from a trusted friend."[34] This is especially true in the context of organizing workers to come together in concerted protected activity. Indeed, the owners of Triple D understood very well the significance of a Facebook "like" in the workplace context, as evidenced by their response to Mr. Spinella's "like," which was his way of standing behind the poster's original comment.

4. SEIU's experiences demonstrate the importance of Facebook engagement in general and the "like" function in particular for modern collective action.

A "like" is a valuable and meaningful act in a variety of settings, including when workers talk to each other about addressing a workplace grievance through a collective action such as a petition. Understanding how and why "likes" are important, and the efforts that organizations like SEIU undertake to garner "likes" on Facebook, illuminates why "like" is an affirmative and meaningful act that must be protected.

When Facebook users "like" content, labor organizations are able to cultivate member loyalty and increase their visibility to the public. For example,

---

[33] *See* Chang Zhou, *Consumers As Marketers: An Analysis of the Facebook "Like" Feature As an Endorsement*, 41 W. St. U. L. Rev. 115, 116 (2013).

[34] *Fraley*, 830 F. Supp. 2d at 792 (N.D. Cal. 2011).

once a user "likes" SEIU's Facebook page, she will receive notifications regarding SEIU's activity on Facebook, including information about collective bargaining, political activism, or statistical information.[35] Thus, by getting a user to "like" its page or content, SEIU gains access to its worker members and to non-union workers, allowing the union to connect workers to activities they may want to participate in, as well as to like-minded workers they may want to join with in participating in demonstrations, or online petition signing, or other concerted activity.

SEIU counts on "likes" as a way for workers to express their support for the union both to SEIU itself and, equally importantly, to other workers. If a worker likes SEIU's Facebook page, that "like" will be shown on the worker's own Timeline where others can see it. The "like" can also play into the Graph Search feature mentioned above, and users may see what their Friends have "liked" via "Sponsored Stories" on their News Feed. These dynamic of Facebook are what allow workers to see who may be open to collective action generally and to participating in a specific union activity such as a rally.

As an example of how Facebook and Facebook "likes" work to spur worker collective action: On April 12, at 2:21pm SEIU shared a quote that stated, "The beauty of standing up for your rights is others will see you standing up as well."

---

[35] *See supra* at Part I.A.

The SEIU webpage encouraged workers to sign up for rallies by saying, "RSVP for an event in your city on 4/15: bit.ly/April-15." That post received 372 likes as of April 16, 2015. This is an example of how online activity leads up to protected activity because SEIU was encouraging the public to participate in a rally calling for a higher minimum wage. The "likes" that the post garnered, and statements of support, were seen by other people, and no doubt certain people liked that post and participated because they saw their friends like the post as well, and lead to people RSVP'ing through the link to attend an action.

The importance of Facebook, and Facebook "likes," to worker collective action is demonstrated by the fact that SEIU puts significant effort into cultivating and providing content that workers will want to "like" so that SEIU content is featured often on users' News Feeds under Facebook's proprietary algorithm. SEIU is constantly reviewing its Facebook page to see what kind of posts get the most "likes" and "shares," which is when a worker distributes SEIU content to all of their Facebook Friends. Workers who visit SEIU's Facebook page can find like-minded people discussing their working conditions, or their beliefs about the adequacy of their wages, and the actions they can take to do something about working conditions and wages, just as the Triple Play workers did in this case.

As a labor union, SEIU supports worker-led campaigns that are attempting to improve working conditions in a variety of industries, and social media is an

integral part of the union's efforts. Facebook posts typically generate discussion among Facebook users regarding the wisdom of a workplace campaign. For example, on April 11, 2015, SEIU shared a photo of a McDonald's worker in Denmark who said that in Denmark, McDonalds' workers make $21 an hour and that a Big Mac sandwich cost only 56 cents more. Some Facebook users and SEIU members spoke in favor of following Denmark's example of higher wages, while others spoke against it (cursing and using other off color language in some cases).

Ultimately, that Denmark worker post generated over 20,000 shares and more than 3,500 likes as of April 16, 2015. The post also provided grist for a spirited debate over whether raising wages is good for the economy and other workers. It is this kind of online engagement that SEIU is seeking to protect.

II. The Court should enforce the NLRB's order.

A. The NLRB correctly held Mr. Spinella's conduct to be protected concerted activity.

As noted by the Board in its brief, Petitioner appears to have admitted that Mr. Spinella's "liking" the relevant Facebook post was protected concerted activity under the NLRA. Indeed, as part of its factual findings, the Board noted that the employer stated that "the 'Like' option meant that Spinella stood behind the other commenters." The Petitioner's effective admission is easy to understand because, as the Board said, Mr. Spinella's "like" was "an expression of approval" of the

status update by the author. *Triple Play Sports Bar & Grille*, 2014 NLRB LEXIS 656, n. 18 (Aug. 22, 2014).

SEIU urges the Court, in reviewing the Board's decisions in these cases, to bear in mind the multiple ways in which a "like" is a statement of support, visible to the individual worker who authorized the post, the community of workers in the "Friend" group, or the public at large, including the employer. It is axiomatic that employees who band together to present grievances are engaged in concerted activity. *Whittaker Corp.*, 289 NLRB 933, 940 (1988) (holding employee's distribution of petition regarding pay and benefits for coworker signature was protected); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969) (same); *Salt River Valley Water Users' Ass'n. v. NLRB*, 206 F.2d 325 (9th Cir. 1953). Clicking "like" is no different than signing a petition because it is an affirmative act of assent stating that a worker agrees with what another is saying, which is exactly what Mr. Spinella did in this case.

Employees' use of modern technology retains the same protections under the NLRA that their use of analog counterparts currently possess, and a Facebook "like" is similar to other kinds of worker conduct long-recognized as protected concerted activity. For example, as a public declaration of support, a Facebook "like" is akin to the wearing of buttons and union insignia, which is common protected activity. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *P.S.K.*

Supermarkets, Inc., 349 NLRB 34 (2007). Like wearing a button that the general public, including customers or clients can see, if a worker "likes" a comment on Facebook, the fact that she or he liked the comment is visible to all individuals who view the comment and the "like" appears on the worker's own Timeline.

That Facebook activity is visible to the public also makes it similar to picket lines and strikes lines, other types of paradigmatic protected activity. Contrary to Triple Play's claims that customer access to the relevant Facebook activity removed it from protection, the Board has made clear that NLRA Section 7 extends to employee efforts to improve terms and conditions of employment, or otherwise improve their lot as employees, through channels outside the immediate employee-employer relationship. *Valley Hosp. Med. Ctr., Inc*., 351 NLRB 1250, 1252 (2007), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978). Indeed, workers have Section 7 protection even when clients and customers are targeted, rather than mere passive observers to worker activity as is the case here. 351 NLRB at 1252, citing *Allied Aviation Serv. Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), *enfd. mem*. 636 F.2d 1210 (3d Cir. 1980) (holding that an employee's letter to customers regarding safety practices at the workplace was protected); *Richboro Cmty. Mental Health Council, Inc*., 242 NLRB 1267, 1267 (1979) (holding that a communication sent by the employee regarding a "decrease in the quality and quantity of service to clients" was

protected); *Cmty. Hosp. of Roanoke Valley, Inc.*, 220 NLRB 217 (1975), *enfd.* 538 F.2d 607 (4th Cir. 1976) (holding statement seeking the public's assistance which focused on patient care at hospital was protected). Even offensive conduct receives the NLRA's protection if it is concerted activity meant to improve terms and conditions of employment. *See Wayne Stead Cadillac*, 303 NLRB 432, 436 (1991) (striking employee received protection of the Act and had not engaged in misconduct when he stated to a customer and his 8-year old daughter "Fuck You, tough shit" and grabbed his crotch while moving his hips back and forth while mouthing the words "fuck you").

Under settled precedent like that just cited, the Board correctly held that Mr. Spinella engaged in protected, concerted protected activity because on Facebook, a "like" is an act of support–the equivalent of a petition signature. At a most basic level, Mr. Spinella's "like" was an expression of support, visible to multiple third parties within the social network, friends of friends, or the general public, depending on the original poster's privacy settings.[36] Additionally, Mr. Spinella's "like" made it more likely that other users would see the liked content, given Facebook's algorithm for publishing content in individuals' News Feeds, which takes "likes" into account.[37] The "like" constituted an action with an affirmative

[36] The record does not disclose the poster's Facebook privacy settings.

[37] Lars Backstrom, *News Feed FYI: A Window Into News Feed*, Facebook, (Aug. 6, 2013), https://www.facebook.com/business/news/News-Feed-FYI-A-

effect on spreading the poster's message that the employer had under withheld its employees' taxes.

B. The Board correctly applied *Jefferson Standard* and *Linn*.

Petitioner's arguments disregard employees' well-established right to reach out to third parties for support during labor disputes and the equally well-established tests under *Jefferson Standard* and *Linn* for determining whether worker concerted activity has somehow lost its protected status.

Employees have a well-established right to speak out and seek the public's support regarding their working terms and conditions, and it is settled that NRLA Section 7 extends to employee efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex*, 437 U.S. 556, 565 (1978). The Board has consistently held that employees have a right under Section 7 to convey their complaints or grievances to third parties or the media in an effort to secure favorable coverage or support. *Valley Hosp.*, 351 NLRB at 1252, citing *Allied Aviation Service Co.*, 248 NLRB at 231, *enfd. mem.* 636 F.2d 1210 (3d Cir. 1980) (holding that an employee's letter to customers regarding safety practices at the workplace was protected); *Richboro Cmty.*, 242 NLRB at 1267 (holding that a communication sent by the employee regarding a

---

Window-Into-News-Feed (stating that in calculating what news items will appear on an individual's feed, Facebook uses an algorithm that considers "[t]he number of likes, shares and comments a post receives from the world at large and from your friends in particular").

"decrease in the quality and quantity of service to clients" was protected); *Cmty. Hosp. of Roanoke Valley, Inc.*, 220 NLRB 217 (1975), *enfd.* 538 F.2d 607 (4th Cir. 1976) (holding statement seeking the public's assistance which focused on patient care at hospital was protected).

The employee right to advocate to third parties is not unlimited, however, and *Jefferson Standard* and its progeny reasonably establish that an employer may discharge or discipline workers when their communications with third parties disparage the employer, or otherwise evidence disloyalty, *unrelated to a labor dispute*. *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. at 471 (finding unprotected a "public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income"). *See also Valley Hosp.*, 351 NLRB at 1252. In *Jefferson Standard* itself, for example, the Supreme Court found that employees of a television company were not protected when they circulated a handbill attacking the quality of the company's television programming.

Applying *Jefferson Standard*, the Board correctly held that Mr. Spinella's Facebook "like" falls on the protected side of the NLRA Section 7 line. Mr. Spinella did not "like" a posting that disparaged Triple Play products unrelated to a labor dispute. On the contrary, Mr. Spinella "liked" a post that was plainly about a labor dispute, *i.e.*, a dispute over tax withholding from employees' pay. The

statement Mr. Spinella "liked," while critical of Triple Play, was related to a labor dispute and did not disparage a Triple Play product.

The Board also correctly held that the employees' speech, including Mr. Spinella's "like," did not lose protection as defamatory under *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). *Linn* makes clear that even employees' pointed public criticism of their employer retains Section 7 protection when it indicates that it is "related to an ongoing labor dispute" and is not "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." *Valley Hosp*., 351 NLRB at 1252; *see also MasTec Advanced Techs*., 2011 NLRB LEXIS 367 (July 21, 2011), quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000) (*petition for review filed*, No. 11-1273 (D.C. Cir.)).

In this case, Mr. Spinella "liked" a post expressing shock and dismay regarding Triple Play's failure to withhold the proper amount of income taxes–a prototypical labor-management dispute. Mr. Spinella did not know, nor had any reason to know, that the original poster would not have to pay taxes. He supported his co-worker in a situation in which even management took the extraordinary step of calling a staff meeting to discuss the payroll issue. The Board, and the Administrative Law Judge who weighed the evidence, concluded that Mr. Spinella did not make any defamatory statements, and nothing Triple Play argues on appeal upsets that.

C. The employer's reliance on *Starbucks* is misplaced.

Petitioner's claim that its position is supported by *NLRB v. Starbucks Corp.* is wrong for a number of reasons, including all those given in the NLRB's brief. SEIU writes to emphasize how accepting Petitioner's argument that all Facebook statements by employees are made "in the presence of customers" and as such unprotected would dramatically circumscribe employee rights under NLRA Section 7.

Virtually all Facebook posts by an employee have at least some potential to be viewed by a customer, which means that if Petitioner's argument that a Facebook "like" or comment should be treated as if the statement were made in a retail establishment were to prevail, virtually all Facebook posts would be unprotected. Such a result would impermissibly chill employee speech online and hold virtually all statements online to a higher standard of decorum than required on the shop floor under current law.

The Board has found that even very offensive comments made to customers or third parties during a strike or picket, though regrettable, still receive the protection of the NLRA. *See supra*, *Wayne Stead Cadillac*, 303 NLRB at 436; *Nickell Moulding*, 317 NLRB 826, 828 (1995) (where striking employee had not engaged in misconduct when he carried picket sign that customers could see stating, "Who Is Rhonda F [with an X through the F] Sucking Today?"); *Calliope*

Designs, 297 NLRB 510, 515 (1989) (finding that a striking employee was still protected by the NLRA when she called a nonstriking employee and her nonstriking daughter a "whore" and "a prostitute" and accused employee of having sex with the employer's president in front of others). These cases, though developed under the Board's strike misconduct doctrine, demonstrate that the NLRA provides protection for offensive statements made to the public. Mr. Spinella's "liking" LaFrance's statement, which stated "WTF," and under which a few co-workers and customers used such language, does not rise to the type of language that falls outside the protection of the NLRA.

Moreover, the above cited cases are about face-to-face conduct workers' making offensive statements directly to third parties, while a Facebook conversation that happens virtually between coworkers is more akin to a conversation on a street corner: customers *might* pass by and hear the conversation, but it is not directed at them and it does not reflect the discipline or brand of the employer's establishment. See *Triple Play*, 2014 NLRB LEXIS 656 at 22 ("Although the record does not establish the privacy settings of LaFrance's page, or of individuals other than Sanzone who commented in the discussion at issue, we find that such discussions are clearly more comparable to a conversation that could potentially by overheard by a patron or other third party than the

communications at issue in *Jefferson Standard*, which were clearly directed at the public").

For these reasons, Petitioner is wrong to analogize Facebook interactions to in-person interactions at a retail location. On Facebook, any customers who overhear a conversation or see a status update about working conditions will see it out of happenstance; there is no physical location for a confrontation as there is in the strike misconduct cases. This obvious distinction between conversations on social media and conversations in customer areas is reflected in cases in which the Board or an ALJ has ignored as irrelevant whether the online conversation might be visible to the public, and thus to customers. See *Novelis Corp.*, 2015 NLRB LEXIS 60, 168 (Jan. 30, 2015) (stating that "comments posted on a social media site accessible by both employees and non-employees" fall under the same test as other comments).

The Board's approach makes sense and reflects reality, and this Court should follow suit and enforce the Board's order finding that Triple Play violated the NLRA by terminating Spinella for engaging in protected concerted activity. Holding otherwise would endanger workers' ability to organize online and would put them in the odd position of being able to use epithets on a strike line in front of a customer while leaving unprotected online conduct that is less confrontational and has no physical element to it.

CONCLUSION

For all of the reasons set out above, the Court should enforce the decision of the NLRB.

Dated: April 20, 2015

Respectfully submitted,

Nicole G. Berner, Deputy General Counsel
Alvin Velazquez, Associate General Counsel

/s/ Alvin Velazquez
Alvin Velazquez
Service Employees International Union
1800 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 730-7490
nicole.berner@seiu.org
alvin.velazquez@seiu.org

Attorneys for Amicus Curiae
Service Employees International Union

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 Times New Roman.

/s/ Alvin Velazquez
Alvin Velazquez

Dated: April 20, 2015